SUPREME COURT, U. S.

FILED
APR 19 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1296

LUPTON MANUFACTURING COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, ALUMINUM COMPANY OF AMERICA, and CUPPLES PRODUCTS COMPANY, *Appellees*.

On Appeal from the United States District Court for the Eastern District of Missouri

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Lupton Manufacturing Company, a curtain wall manufacturer, (hereinafter referred to as Lupton) appeals from the order of the United States District Court for the Eastern District of Missouri, made on January 13, 1967, denying Appellant's motion to intervene in this action. (Appendix A, *infra*). Appellant submits this statement to show that this Court has jurisdiction of this appeal and that the questions are substantial.

CITATION TO OPINION BELOW

The Memorandum opinion of the District Court denying the application of Lupton Manufacturing Company to Intervene, as well as corrections thereto, have been reported at 41 F.R.D. 342 (1967) and is reproduced herein as Appendix A, *infra*.

JURISDICTION

The Aluminum Company of America, hereafter referred to as Alcoa, acquired the Cupples Manufacturing Company, hereinafter referred to as Cupples, on January 22, 1960. In April 1961 the United States brought a civil action against Alcoa-Cupples in the United States District Court for the Eastern District of Missouri charging that such acquisition constituted a violation of Section 7 of the Clayton Act. On September 22, 1964, the District Court found such acquisition to be unlawful, *United States* v. *Aluminum Company of America and Cupples Products Corporation*, 233 F. Supp. 718, (1964), and ordered divestiture. On October 11, 1965, this Court granted the motion of the United States to affirm and affirmed the judgment of the District Court per curiam, *Aluminum Company of America, et al.* v. *United States*, 382 U.S. 12 (1965).

As of December 1966 divestiture had not taken place, but on the contrary Alcoa-Cupples were jointly conducting business activities. Lupton, after fruitless conferences with the Antitrust Division of the Department of Justice, filed a motion to intervene in the pending divestiture phase of this litigation under Federal Rule of Civil Procedure 24(a)(2) and 24(b)(2) in order to challenge the anti-competitive actions of Alcoa-Cupples, which not only threatened to frustrate the object of divestiture but also violated the provisions

of the District Court's decree (R. 6).[1] The District Court ruled from the bench (R. 263-264), denying Lupton's motion to intervene, and subsequently filed a Memorandum opinion, 41 F.R.D. 342 (1967), (Appendix A).

Notice of appeal was filed in the United States District Court for the Eastern District of Missouri on January 19, 1967 (R. 273).

Jurisdiction to review the action of the District Court is conferred upon the Court by 62 Stat. 989 (1948), 15 U.S.C. § 29. Jurisdiction is sustained by the following decisions: *Cascade Natural Gas Corporation* v. *El Paso Natural Gas Co. et al.* No. 9; *People of the State of California* v. *El Paso Natural Gas Co. et al.*, No. 5; and *Southern California Edison Co.* v. *El Paso Natural Gas Co.*, No. 24, — U.S. — Decided February 27, 1967. 35 L.W. 4227.

QUESTIONS PRESENTED

1. Whether the District Court erred:

A. In denying the Motion to Intervene filed by Lupton, under the provisions of revised Rule 24(a) of the Federal Rules of Civil Procedure.

B. In denying the Motion to Intervene filed by Lupton, under the provisions of Rule 24(b) of the Federal Rules of Civil Procedure.[2]

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[1] See also Supporting Memorandum (R. 10), Affidavit of Leonard Starr (R. 22) and Affidavit of Peyton Ford (R. 136).

[2] The question whether the District Court on the basis of the facts adduced at the Hearings of January 12, 1967 should have entered an order for the whole or part of the relief sought by the movant if it had been permitted to intervene has been subsumed in the discussion of the questions presented.

STATUTES AND RULES INVOLVED

STATUTES:

Expediting Act, 15 United States Code, Section 29, 32 Stat. 823 (1903), as amended 36 Stat. 1167, (1911); Section 7 of the Clayton Act, 15 United States Code, Section 18, 38 Stat. 731 (1914), as amended, 64 Stat. 1125 (1950); Section 15 of the Clayton Act, 15 United States Code, Section 25, 33 Stat. 736 (1914), as amended, 62 Stat. 909 (1948).

RULES:

Rule 24(a) and Rule 24(b) Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Prior Proceedings

On April 27, 1961, the Department of Justice, on behalf of the United States as plaintiff, brought suit against Alcoa and Cupples alleging that the acquisition of Cupples by Alcoa violated the anti-merger provisions of the Clayton Act. The acquisition of Cupples, the number one fabricator of aluminum curtain wall, with 16.6 per cent of the aluminum curtain wall market, by Alcoa, the number one primary aluminum producer, was alleged by the Government to cause a substantial lessening of competition and to tend to create a monopoly by: eliminating potential competition in the architectural products field between Alcoa and Cupples; giving Cupples competitive advantages over fabricators not connected with integrated primary aluminum producers; and possibly foreclosing sales of primary aluminum by Alcoa's competitors to Cupples (subsequently abandoned). *United States* v. *Aluminum*

Company of America, 233 F. Supp. 718 (D.C. Mo. 1964).

On July 30, 1962, a preliminary injunction was issued by the District Court prohibiting Alcoa and Cupples from further consolidating or commingling business assets or personnel, such order specifically enjoining them, *inter alia,* from any further consolidating or commingling of any business assets, financial, good will, personnel or otherwise; requiring Cupples to continue to exercise independent judgment and activity in its operations; requiring Alcoa-Cupples to continue to publicize distinctly the name of Cupples in connection with products Cupples manufactures and to make no more pronounced indication of Cupples' affiliation with Alcoa than existed in the exhibits before the Court at the time of the injunction; requiring the maintenance of separate pension plans and separate sales organizations; restraining defendants from transferring any Cupples employees to Alcoa and restraining Alcoa from employing any of Cupples' employees; and requiring that products manufactured in the Corona, California, plant be Cupples' products and that they be sold and advertised as Cupples' products (R. 1).

On September 22, 1964, the District Court determined that Alcoa's acquisition of Cupples was in violation of Section 7 of the Clayton Act. In the Court's opinion, reported at 233 F. Supp. 718 (1964) certain specific findings were made which are relevant and important in the present proceeding.[3] Alcoa, the Court found, had acquired Cupples with the avowed purpose of obtaining forty per cent (40%) of the aluminum

[3] A table of these findings is set forth in Appendix B, *infra.*

curtain wall business, and Alcoa had the power to achieve its goal. *Id.* at 729-730. The Alcoa-Cupples combination possessed an overpowering competitive leverage which could be exercised whenever necessary to exclude the non-affiliated competitors of Cupples. Alcoa would be able, whenever it chose to do so, to operate Cupples on a break-even basis or even a loss basis and still make a profit on the aluminum sold by Alcoa to Cupples so that there would be profit on the overall operation. *Id.* at 727-728.

The Appellant

Appellant Lupton Manufacturing Company (formerly Michael Flynn Manufacturing Company), is the successor to David Lupton's Sons Company, a metal window manufacturer and a Pennsylvania corporation with its principal place of business in Philadelphia. Since 1953 Lupton has been continuously engaged in the manufacture and installation of curtain walls, including, since 1954, curtain walls for numerous high-rise office buildings in New York City. The New York City market represents about 60 per cent of the national total of curtain wall construction (R. 22).

The Facts Which Occasioned the Need for Intervention

The Court's Final Judgment filed December 4, 1964, required Alcoa to submit within 60 days a plan for accomplishing the required divestiture of Cupples (R. 4). Paragraph 5 of the Court's order (R. 4) incorporated an earlier order described above which enjoined the defendants *pendente lite* from any further consolidation or commingling of assets, personnel, pensions plans and advertising (R. 1), and required spe-

cifically that Cupples exercise independent judgment and activities in its operations (R. 1).

On February 18, 1966, the District Court approved Alcoa's plan of divestiture.[4] In November 1966, Alcoa submitted a report stating that as yet no buyer had been found for Cupples (R. 283).

During all this time and beginning in October 1963, while the litigation was pending, Alcoa and Cupples were developing a proposal to The Port of New York Authority* to erect the aluminum curtain wall on the proposed World Trade Center Building (R. 214-218). See *United States* v. *Aluminum Company of America*, 41 F.R.D. 342 at 343. This project embraces two huge towers, each having a base dimension of 200 feet by 200 feet, and rising 110 stories or approximately 1500 feet. The construction represents the tallest buildings in the world and will dominate the New York City skyline. *Id.* at 343.

In December 1966, Alcoa submitted a bid to The Port of New York Authority to be carried out by and through Cupples which would link the two companies together for many years in the future (R. 218). Lupton also submitted a bid on December 2, 1966, as required by the invitation documents (R. 24). Unlike Lupton's bid however, Alcoa's represented that the major part of the work would be performed by Cup-

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[4] The Government notes this fact in its memorandum dated March 31, 1967 (S.R. 1).

* The Port of New York Authority is an agency established by virtue of compacts between the states of New York and New Jersey and approved by the Congress of the United States.

ples (R. 24, 218).[5] The requirements of the proposal demanded that the successful bidder guarantee the work for a period of twenty-five years (R. 107). The requirements further provided that any subcontractor was made the express agent of the successful bidder who was to be responsible for the successful completion of the project (R. 42).

It appears in the record that Alcoa has never fabricated a metal curtain wall (R. 24). See also *United States* v. *Aluminum Company of America*, 233 F. Supp. at 721. Alcoa used the personnel and the facilities of its subsidiary, Cupples, to design the curtain wall and to assist in the preparation of the quotation and in various presentations to the Port of New York Authority and to the architects (R. 25-26). Indeed, on the date of delivery of the bid, personnel from both Alcoa and Cupples were present together at the Port of New York Authority (R. 24, 241, 242). It was developed in some detail at the hearing on intervention that Cupples had been assisting Alcoa in the preparation of this project well over two years. After the submission of Alcoa's initial bid, personnel of both Alcoa and Cupples worked both separately and in concert to obtain this contract with the Port Authority. Such post-submission activity included a modification downward of the initial Alcoa bid, after Lupton's bid had been submitted[6] (R.251, 252). It is interesting to consider the testimony of Cupples' officials on this modification.

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[5] Mr. Leonard Starr testified under oath that Lupton did not learn of the cooperation between Alcoa and Cupples until November 1966. (R. 256, 257) See also Exhibit 4 (R. 265).

[6] Denial of intervention made it impossible for appellant to develop through discovery the circumstances surrounding this modification.

President Charles Moran stated he knew and agreed to the modification (R. 251, 252) whereas the chief engineer Mr. Davis had no knowledge of any bid reduction (R. 242) and Executive Vice President Roger Lord testified that the bid had not been changed at any time to his knowledge (R. 245-246).

On January 24, 1967, some eleven days after the Court's memorandum opinion denying Lupton's intervention, the Port Authority announced that Alcoa had won the $21,250,000 contract to fabricate and erect the aluminum curtain wall and that Alcoa would assign the work to Cupples Products Corporation.

Under the invitation to submit bids and the proposed contract, curtain wall installation will start January 1969 and will require approximately two years to complete, a total of almost four years from the date when intervention was sought (R. 46, 47).

The low bid submitted by Alcoa has not been shown by the Government or Alcoa to be profitable for Cupples, rather than for Alcoa in supplying the necessary primary aluminum. During the four year period required for completion of the curtain wall contract, Alcoa and Cupples will have to continue to maintain the closest kind of cooperation and exchange of information (R. 245, 249-250).[7] The effect of this on the prospect of divestiture was not investigated by the Court on the basis of facts put on the record by knowl-

[7] Alcoa has enlisted the services of Cupples personnel for the solution of the engineering design (R. 235, 236), finishing and fabrication problems associated with this project (R. 242, 243), and in fact, Alcoa's proposal could not have been prepared nor could Cupples have prepared an acceptable proposal, had they been invited to do so, without the closest kind of cooperation between Alcoa and Cupples (R. 25, 26).

edgeable people. The Court had only the opinions of counsel for the parties on this subject, opinions which coincided.

All of the parties to the action resisted Lupton's requested intervention. None of the parties however, introduced any evidence either by way of rebutting Lupton's affidavits or the witnesses called by Lupton at the hearing on the motion. Indeed, none of the parties availed itself of the right to cross-examine any of the five witnesses called by Lupton. Rather, each relied on their written briefs and argument of Counsel.

The Department of Justice took the position that it had investigated the matter and was taking the steps it deemed necessary to assure compliance. It was asserted that the proposed terms of arrangements between Alcoa and Cupples had been reviewed and "they are not, on their face at least, disadvantageous to Cupples." (R. 187) The Department stated it was continuing to investigate the matter and had already required certain corrective action to be taken. A "series of commitments" (R. 186-187) had been secured from Alcoa designed to prevent Alcoa's acquiring, by reason of the contract, any good will belonging to Cupples. These commitments were represented to include the assurances that Alcoa would assign the contract to Cupples and that Alcoa would not advertise or represent that the contract was secured on the basis of its own expertise in the curtain wall field (R. 187). These commitments were not, however, filed with the Court or made a matter of record beyond the meager description of them by Counsel. The Court did not require that they be made a part of the record (R. 210-211). Lupton had no opportunity to examine

them and inquire into their scope, qualifications, meaning and effect.

The testimony presented by Lupton was met by nothing more than the naked assertions of counsel, who made many allegations of fact, not verified or supported by any papers other than the argument and defense briefs.

Judge Meredith, in denying intervention by a ruling from the bench (subsequently he filed a Memorandum opinion, Appendix A), stated in essence that "the Antitrust Division of the Justice Department has diligently protected the interest of the Public," *United States* v. *Aluminum Co. of America*, 41 F.R.D. 342, 343, and that "there was considerable authority to support the view that no one other than the Government should be permitted in this law suit at this time, and none to support intervention," *Id.* at 344, citing among other authorities *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961) and *United States* v. *El Paso Natural Gas Co.*, 37 F.R.D. 330 (1965).

THE QUESTIONS ARE SUBSTANTIAL

Two fundamental questions are presented for the Court's scrutiny. The first question relates to the proper interpretation of the recent amendments to Rule 24(a)(2) as they relate to the quality and nature of the interest a proposed intervenor must have relating to the "property or transaction" which is the subject matter of the action involved, as well as, the burden of proof that the would-be intervenor must bear in relation to the issue of adequacy of representation. The second question involves the right of members of the competitive class determined to be endangered by

an unlawful acquisition to press for speedy and effective divestiture, as well as appropriate injunctive safeguards pending such divestiture.

The importance of the procedural questions is intensified by virtue of their being intertwined with the problem of effective enforcement of Section 7 of the Clayton Act. Effective enforcement is not achieved merely by obtaining a favorable judgment and decree of divestiture, which can become emasculated if prompt divestiture is not pressed for by the Department of Justice and insisted upon by District Judges. The relief stage of fully adjudicated merger cases cannot be suffered to become unsafeguarded bargaining sessions between the Department and unsuccessful defendants to reach compromises at this terminal stage of long litigation, built upon acceptance of unilateral acts like the Alcoa-Cupples long term contract with the Port Authority of New York. Otherwise, there is the danger of undermining and frustrating the aims and objectives of Section 7.

The fact that divestiture may be difficult and in some cases take considerable time to accomplish accentuates the need for effective injunctive relief, enforced by the District Courts, pending the achievement of a divestiture which has been decreed. The matter now before this Court demonstrates what follows from the lack of appropriate safeguards, when defendants are suffered to continue joint business activities of the type previously adjudged to be anticompetitive, with the acquiescence of the Department of Justice, *activities which would be no different if the defendant had won the Section 7 case.*

THE DISTRICT COURT ERRED IN DENYING THE MOTION TO INTERVENE FILED BY LUPTON PURSUANT TO THE PROVISIONS OF RULE 24(a) AND 24(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

The Right To Intervene Under Rule 24(a)

In seeking intervention appellant relied upon the modification of Rule 24 which liberalized and broadened the right to intervene and which eliminated the restrictive standards which were the lodestar of the decision in *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961). That such liberalization was intended is disclosed by the changing of the wording of the rule.[8] It is further borne out by the Advisory Committee's Notes which criticized the results of the *Sam Fox* standard, and spelled out the intended relationship with amended Rules 19 and 23. Additionally the amendment reflects, when read in conjunction with the Committee's Notes, that practical considerations were to be of paramount importance. Thus:

> A class member who claims that his 'representative' does not adequately represent him, and is able

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[8] (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the [representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the Court or an officer thereof.] *applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.* (Italicized portion represents the amendment; the language in brackets has been deleted.)

> to establish the proposition with *sufficient probability* . . . should as a general rule, be entitled to intervene in the action. (emphasis added.)

At the hearing on its motion to intervene Appellant established by unrefuted affidavits and testimony all of the elements necessary to present a *prima facie* right to intervene. The District Court, however, concluded that the amendment to Rule 24 in no way altered the *Sam Fox* standard and cited *United States* v. *El Paso Natural Gas Co.*, 37 F.R.D. 330 (1965) as recent authority for the Federal Government's right to resist interveniton in Section 7 actions. The Court further stated "that there was considerable authority to support the view that no one other than the Government should be permitted in the law suit at this time, and none to support intervention." Citing *United States* v. *Radio Corporation of America*, 186 F. Supp. 776 (E.D. Pa. 1960). *United States* v. *Aluminum Company of America*, 41 F.R.D. 342 at 344.

The decision of the Court in the *R C A* case related to a consent decree and is so distinguishable from the instant as to be of no precedental value. This Court on February 28, 1967, reversed the *El Paso* decision and determined that intervention under Rule 24 would be permitted in the relief stages of a Section 7 case. *Cascade Natural Gas Corporation* v. *El Paso Natural Gas Co. et al. supra.*, The Court held that a distributor of natural gas whose interests would be adversely affected by the enforcement of a divestiture decree had standing to intervene under amended Rule 24 to protect such interests. The presence of Government representation was not considered an absolute bar to Cascade's intervention. On the contrary, the action of the Government in bargaining with the de-

fendants in order to facilitate divestiture was viewed as inherently inimicable to the interest of Cascade.

The Government's acquiescence in the combined efforts of Alcoa-Cupples in obtaining the Port of New York Authority contract cannot but be viewed as harmful to the interest of Lupton in the achievement of timely, effective divestiture. Indeed the record is replete with unrebutted testimony disclosing actions on their face dangerous to the interest of Lupton and dangerous to the public interest. In *United States* v. *Terminal Railroad Association of St. Louis*, 236 U.S. 194 (1914) this Court noted with approval the right to intervene when an order of the Court on its face was or could be considered harmful to the intervenor. Certainly the language of amended Rule 24(a) embodies this concept in providing for intervention where "the disposition of the action may as a practical matter impair or impede his ability to protect that interest."

Counsel for the Department of Justice advised the District Court on January 12, 1967, that the Department viewed the continued joint business relationship of Alcoa-Cupples as simply Alcoa helping Cupples by building it up and thereby making Cupples more "divestible." (R. 208-209) The Government further apparently was not concerned because "The date for divestiture, of course, is February 1, next, so that divestiture should be taking place, and we certainly expect that it will be taking place very promptly. Therefore, this situation will not endure and should not endure very much longer." (R. 209).

However, Alcoa had not found a purchaser for Cupples by negotiations over many months and at this time had been advertising Cupples for sale in the press. As

far as the record shows no prospective potential purchaser had turned down Cupples because it lacked a big long-term contract like the Port Authority's. Nothing in the record discloses that on the basis of expert judgment such a contract would make Cupples more "divestible" rather than less so by reason of continued ties to Alcoa and pre-commitment of a significant part of its productive capacity for a period of years. The only evidence in the record on this point is testimony presented by the appellant, on the basis of long experience in this industry, that a contract with the Port Authority would impair the prospect of timely divestiture (R. 26).

Then on February 1, 1967, the date set for divestiture, Alcoa filed its third report, which disclosed that it had no divestiture to propose and requested an extension of time until July 1, 1966 (sic) (Appendix C. *infra.*) to accomplish divestiture. The report sets forth three offers to purchase Cupples which were made in the first month of 1967, all of which were rejected by Alcoa.

By petition and memorandum dated March 31, 1967, the Department of Justice opposed any further extension of time and requested the Court to modify the final judgment (Appendix D, *infra*). The proposed modification, which would become effective in 90 days if Alcoa has not divested within that time, would provide for the establishment of a voting trust and an independent managerial board whose duty it will be to sell all the stock of Cupples within six months. If the board cannot find a purchaser it will offer the assets of Cupples at public sale to the highest bidder. For one year after the modification date Alcoa is not to

contract to supply any of Cupples' aluminum requirements, unless Cupples cannot secure favorable price and terms elsewhere. Likewise Alcoa is not to engage in the curtain wall business for a five year period.

The filing of this petition is a tacit admission that the public interest and the interest of the Appellant (and those situated like it) have not been adequately protected. The Government in its memorandum admits in effect that it was misled into believing that the award of the Port Authority contract to Alcoa-Cupples would promote timely divestiture of Cupples. (S.R. 2-3)[9]

What the Government now proposes is no panacea or even presumptively desirable. It is nothing more than a half measure, seemingly devised by counsel without any supporting material showing that economics or experienced business judgment makes the proposal one which promises effective relief. The Government's proposal is merely prospective in nature and does not attempt to deal with the difficulties which have been created, by its sufferance, and which will continue to have an abortive effect upon divestiture. A one year prohibition, for the future, of new contracts to supply aluminum to Cupples, is no cure for what has been achieved in tying Cupples to Alcoa.

Intervention by appellant will make possible full discovery, the presenting of the testimony of economists and industry witnesses, and the joinder of the

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[9] Supplemental designation of record 13 April 1967 is included as part of the record.

Port of New York Authority as a party to ensure the devising of effective relief. See 15 U.S.C. § 25.[10]

The appellant proposed this course of action in January 1967. Had intervention been granted the District Court would have had the opportunity to have full factual materials and the Port Authority before it. The "commitments" would have become a part of the record, and not as a condition for denying intervention as stated by counsel for Alcoa. They would have been weighed and evaluated, as to meaning, qualifications, scope, etc. before decision on intervention was made. Yet for reasons which the Government in effect now admits were erroneous, the Government opposed intervention. Appellant should be permitted now to intervene to disclose the inadequacy of the half measure, grounded in inconsistency, and unsupported by facts, advanced by the Government. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co., supra.*

The Right To Intervene Under Rule 24(b) (2)

Appellant, Lupton, presented Rule 24(b)(2)[11] as an alternative ground to support intervention.

As detailed in the foregoing discussion of the application of Rule 24(a) *supra,* Lupton is a member of

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[10] Compare, *U. S.* v. *E. I. DuPont Nemours and Co.*, 177 F. Supp. 1 (D.C.N.D. Ill. 1959). In a proceeding under § 7 of the Clayton Act, the Court has authority to grant relief not only against parties found to have violated that section, but also against other parties if such relief is necessary to eliminate the effects of the acquisition offensive to the statute. Likewise, the liberality of joinder which is permitted in private antitrust actions provides an analogous consideration. *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 241 F. Supp. 259 (D.C.S.C. 1965).

[11] This rule provides that "upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim . . . and the main action have a question of law or fact in common."

the industrial class sought to be protected by the District Court's judgment and decree. As a member of this class Lupton sought standing to obtain relief from proscribed anticompetitive activities on the part of Alcoa-Cupples.

There can be little doubt that Appellant amply fulfilled the timeliness requirement of Rule 24(b). As soon as Appellant had definitive knowledge of the Cupple-Alcoa activity, it notified the Department of Justice on December 5, 1966 (R. 139), as well as the Port of New York Authority on December 7, 1966 (R. 142). When it became apparent that the Department of Justice would not disclose whether or not it was going to take corrective action, Appellant filed its motion to intervene.

An examination of the District Court's ruling from the bench and its Memorandum opinion fails to show any consideration of Lupton's motion in regard to permissive intervention. The District Court abused its discretion in not permitting the applicant to intervene, *Philadelphia Electric Co.* v. *Westinghouse Electric Corp.*, 308 F. 2d 856 (3d Cir. 1962); 4 Moore's Federal Practice (2d Ed.) ¶ 2415, when it ignored the unrefuted evidence presented in support of the motion. It is obvious from this evidence that Alcoa was operating by and through Cupples as if there were no order like the Final Judgment of 1964.

The evidence presented demonstrated that divestiture could be long delayed if not thwarted entirely if Alcoa were allowed to tie Cupples to a long-term contract, which by its very terms required Cupples or its successor to be the agent of the successful bidder Alcoa (R. 25). The question of profitability of such a contract to Cupples, as well as the details of

any assignment which Alcoa, the Justice Department and the Port Authority contemplated, were avoided by the Judge during the hearing as apparently unnecessary inquiries. (Counsel for Lupton had agreed that such matters could be disclosed to the Court and Counsel for the Department of Justice for their benefit alone for purposes of the hearing on Lupton's motion to intervene.) (R. 210-211). As the record now stands, it is crystal clear that the Appellant presented a *prima facie* case that the contemplated contract would hinder timely and effective divestiture of Cupples by Alcoa.

CONCLUSION

For all the reasons here presented the Appellant prays that the Court (1) reverse the order of the District Court denying intervention and (2) establish guidelines for the District Court's execution of its decree of divestiture, by which the impediments to divestiture will be removed and the existing and potential contractual ties between Alcoa and Cupples will be neutralized or precluded for a sufficient period of years to clear the way for effective divestiture.

Respectfully submitted,

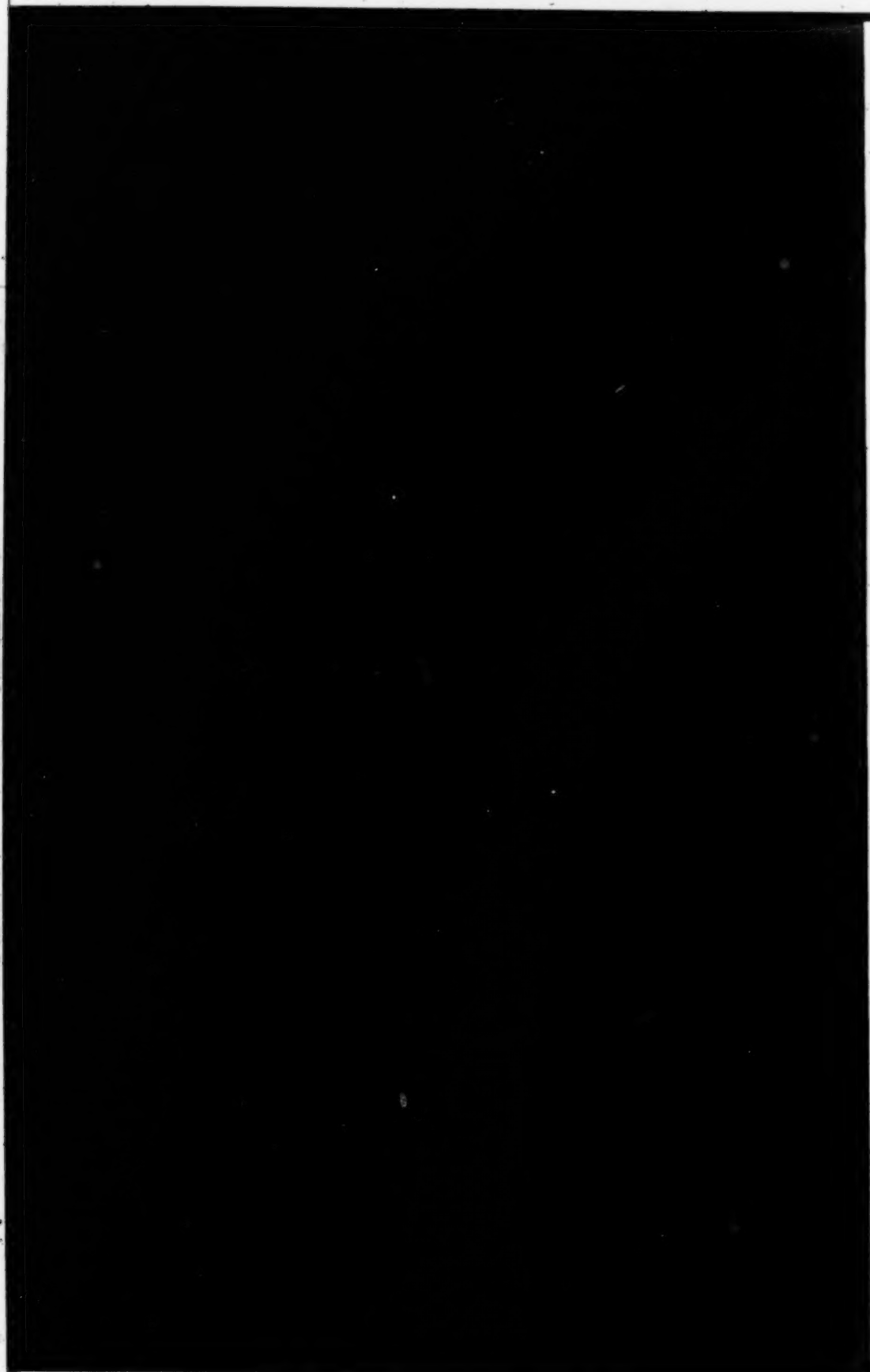
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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 61 C 147 (2)

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

ALUMINUM COMPANY OF AMERICA and CUPPLES PRODUCTS CORPORATION, *Defendants*.

Memorandum

On January 4, 1967, Lupton Manufacturing Company filed in the above case a motion for leave to intervene as a plaintiff in this action, a motion for an order to show cause as to why defendants should not be found to have violated the final order of this Court dated December 4, 1964, and a motion for a preliminary injunction enjoining the defendants from taking any action with regard to a bid submitted to the New York Port Authority to fabricate and erect the aluminum curtain wall on the World Trade Center building in New York City.

A brief hearing was held on the morning of January 4, 1967, and the matter was continued until January 12, 1967.

In the early fall of 1963 the Port of New York Authority determined to build a World Trade Center in New York City, at a total cost of $525,000,000. This building will consist of twin 110-story towers overlooking the Hudson River. It will be the world's largest building. Cupples Products Corporation became interested in the fabrication of the curtain walls. At that time they were a wholly-owned subsidiary of Aluminum Company of America (Alcoa). The antitrust action had been brought by the government

to require Alcoa to divest itself of Cupples. Proceedings had not been concluded in the district court. A decision was filed by this Court on September 22, 1964, 233 F.Supp. 718. The final judgment was entered by the district court on December 4, 1964, requiring Alcoa to divest itself of Cupples, including after-acquired property at Corona, California, 247 F.Supp. 308. An appeal was taken to the Supreme Court. The judgment of the district court was affirmed October 11, 1965, 382 U.S. 12. Thereafter, Alcoa's proposal to divest itself of Cupples was disapproved on August 9, 1966, 257 F.Supp. 466. The date on which Alcoa has been required to submit to the Court a plan of divestiture of Cupples is February 1, 1967.

During the entire proceedings the Antitrust Division of the Justice Department has diligently protected the interest of the public in obtaining the goal set out by this Court to restore Cupples to a position as an independent entity in the aluminum fabricating business.

From the fall of 1963 until December 1966, Alcoa and Cupples have been attempting to obtain the contract for the erection of aluminum curtain walls at the World Trade Center. Their competition in this matter have been Kawneer and Lupton in conjunction with other primary aluminum producers. The bids were apparently opened in early December 1966, and it would appear that Alcoa is the low bidder. On December 5, 1966, Lupton notified the Antitrust Division of this development and requested it to intervene and ask this Court to enjoin Cupples and Alcoa from proceeding with the bid. The Antitrust Division has vigorously examined the situation from that time to the present date and has required Alcoa and Cupples to submit a great deal of information concerning the circumstances of the bidding for the purpose of determining whether or not they have violated any provisions of the final judgment of this Court. After a careful examination, of this situation, the Antitrust Division has concluded in

its opinion there has been no violation and it opposes the motion of Lupton to intervene in this proceeding.

Apparently the Port of New York Authority has required bids on this contract to be submitted by Alcoa and has consented to the assignment of the contract from Alcoa to Cupples. To complete the project, on which construction is scheduled to begin in January 1969, will take approximately two years.

Lupton has requested the Court for permission to intervene under Rule 27, F.R.C.P., and failing to intervene, Lupton suggests the Court on its own motion issue a temporary restraining order or a temporary injunction to prevent irreparable injury to themselves, to the general public, and to prevent the order of divestiture of this Court from being delayed. The Court is of the opinion that if this suggestion of Lupton's were followed and a temporary restraining order or injunction issued, it would leave the Port of New York Authority in such a condition it would have to seek elsewhere for someone to construct the curtain wall on this project. The logical place to look under these circumstances would be Lupton, and undoubtedly this is the primary reason Lupton suggests this Court take the proposed course of action.

The entire process of this trial has been long and tedious, and the ultimate goal sought to be achieved is divestiture. This Court has no intention of permitting Lupton, or any other unsuccessful bidder on a job in which Cupples is interested, to intervene in this already complicated litigation.

It stands to reason that the Port of New York Authority has no desire to let a contract which would require it to get involved in an antitrust suit not of its own making.

Cupples, like any other company that has been ordered to be sold, has had personnel problems and to deprive

it of this particular contract would further complicate its salability.

There is considerable authority to support the view that no one other than the government should be permitted in this law suit at this time, and none to support intervention. *United States* v. *Radio Corporation of America*, 186 F.Supp. 776 (E.D.Pa. 1960), appeal dismissed *Westinghouse Broadcasting Co.* v. *United States*, 364 U.S. 518 (1960); *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961); *United States* v. *El Paso Natural Gas Co.*, 37 F.R.D. 330 (1965). Accordingly, this Court will deny the motion of Lupton to intervene and will not issue a show cause order nor a temporary injunction or take any other action which will hamper the divestiture of Cupples.

Dated this 13th day of January, 1967.

JAMES H. MEREDITH
United States District Judge

Order

A memorandum dated this day is hereby incorporated in and made a part of this order.

IT IS ORDERED that Lupton Manufacturing Company's motions to intervene, for order to show cause, and for preliminary injunction be and the same are hereby denied. The costs of this proceeding are taxed against Lupton Manufacturing Company.

Dated this 13th day of January, 1967.

JAMES H. MEREDITH
United States District Judge

Order Nunc Pro Tunc

The Court's memorandum of January 13, 1967, is hereby amended as follows: On page 3, at line 14, after the word "violation" is inserted the phrase "warranting an injunction".

Dated this 16th day of January, 1967.

JAMES H. MEREDITH
United States District Judge

Order Nunc Pro Tunc

IT IS HEREBY ORDERED that on page 3, the last paragraph, line 2, of the Memorandum dated January 13, 1967, should read as follows:

"intervene under Rule 24, F.R.C.P., and failing to intervene,"

Dated this 20th day of January, 1967.

JAMES H. MEREDITH
United States District Judge

APPENDIX B

Table of Relevant Findings Made by the Court in United States v. Aluminum Company of America and Cupples Products, 233 F. Supp. 718.

A. Prior to the acquisition of Cupples, neither Alcoa nor any of its subsidiaries engaged in the fabrication of curtain wall or primary windows, but alcoa was a supplier of aluminum to Cupples and others for use in making these and other building products. *Id.* at 721.

B. That Cupples had total sales in 1961 of $19,699,027, and that of this total, $10,764,000 was in the sale of curtain wall. *Id.* at 722.

C. The determination of what materials and designs will be utilized for the construction of a building is made by the architect and the owner. Metal suppliers of non-load-bearing walls seek not only to have metal specified, but also seek to have such design specifications of that material designated as will permit their advantageous bidding once the general contract has been named. One such sub-bid may be for the non-load-bearing exterior walls . . . If the architect determines to have the curtain wall in metal, he may not only specify the type of metal, he may, in addition, specify metal made by Alcoa, Reynolds, Kaiser or others. Further, he may likewise specify a design of a particular fabricator and may specify the fabricators who are acceptable as bidders, such as Cupples . . . . *Id.* at 723.

D. The covering of a building is generally about five per cent of the total cost of the building . . . . Once the architect has settled on a design for curtain wall, if it is determined to be in metal, the competition is between the various metal suppliers and fabricators. *Id.* at 724.

E. Cupples was the largest aluminum curtain wall fabricator (1957), having 16.6% of the industry total. Plaintiff herein (formally Michael Flynn) was found to be the fourth largest fabricator with 6.9% of the industrial total. *Id.* at 726.

F. Only the large aluminum-curtain-wall fabricators have the financial resources, the engineering know-how and the experience to fabricate and erect aluminum curtain wall on large high-rise and multi-story buildings. *Id.* at 727.

Nothing would prevent Alcoa from permitting Cupples to operate on a break even basis or a loss basis for an extended period of time and at the same time make a profit on the aluminum sold by Alcoa to Cupples so that the overall operation would be at a profit.

The tendency of building owners is to require a guarantee on aluminum curtain wall for a period of five to twenty years.

Alcoa's financial reputation in relation to giving guarantees on large curtain wall jobs inures to the benefit of Cupples because a prospective purchaser of curtail wall would much rather have this guarantee than the guarantee of a smaller company. In addition, the reputation of Alcoa in solving engineering problems in aluminum makes a guarantee from Cupples more attractive than a guarantee from a company not affiliated with a primary producer.

The evidence shows that Alcoa now furnishes their engineering know-how and skill to Cupples, as well as to Cupples' competitors, and that new developments are being promoted with all fabricators on an equal basis. While this is true at the present time, there is no assurance that in the future Cupples will not be given advance information on new developments that will render other fabricators powerless to compete with Cupples. It does not seem unreasonable that Alcoa in the future would put all the aluminum curtain wall business possible into Cupples instead of the 40% which they announced as their intention when acquiring Cupples. *Id.* at 727-28.

G. In view of the avowed purpose of Alcoa to get 40% of the business of aluminum curtain wall by their acquisition of Cupples, this would mean that Cupples would have to increase their 16.6% to 40% to attain this goal. Does Alcoa have the power to increase this per cent in Cupples? This Court is of the opinion it does. If they have the power to do this, will they? This Court is of the opinion they will if Alcoa continues to own Cupples. If Cupples achieves 40% of the aluminum curtain wall business, it will then remove some of the smaller companies completely from this line of commerce and the larger ones will have a difficult time competing with the combination of Cupples and Alcoa. In reaching such a conclusion, the evidence shows that by being a subsidiary company of Alcoa, Cupples enjoys many advantages not possessed by their competitors in the field. Among those advantages is the ability to obtain unlimited funds." *Id.* at 727.

H. Alcoa sells aluminum to jobbers at a lower price than it sells to fabricators. The evidence is that Alcoa now sells to Cupples at the same price it sells to other fabricators. Nothing would prevent Alcoa in the future from selling to Cupples at jobbers prices, which would put Cupples in an even more advantageous position than other fabricators. Alcoa through the years has acquired a reputation with architects and builders as a pioneer in new developments. They spend large sums of money to advertise in trade magazines and on television, and in promoting expense-free trips to the home office by various persons in the trade, such as architects and builders, to show them new processes. Now, as a subsidiary of Alcoa, this prestige benefits Cupples,

Certain sizes, shapes and patterns for aluminum curtain wall are extruded from dies which are expensive and which are owned by Alcoa. At the present time, these dies are made available to all of Alcoa's customers, including the competitors of Cupples, provided the aluminum is purchased from Alcoa. It would be reasonable to assume this will continue as long as Cupples uses only 16% of the aluminum in curtain wall because Alcoa does not want to lose the other business. But what would Alcoa do when Cupples achieves 40% of the market? Or more than 40%? Would not Alcoa use its advantages to help Cupples and to thereby help itself? This Court is of the opinion that it would.

Duranodic finish adds a hard coat and color which makes aluminum attractive as a curtain wall material. It costs $100,000 or more to establish this process. Cupples is one of the companies licensed by Alcoa to use Duranodic. The Kalcolor licensed by Kaiser is another color process which competes with Duranodic finish. Because of its cost a small company is not able to install this process. Without color finish on aluminum, a firm cannot successfully compete in the aluminum curtain wall market. *Id.* at 728-29.

APPENDIX C

Defendants' Third Report and Petition for Extension of Time To Effectuate Divestiture

Pursuant to Paragraph 7 of the Plan of Divestiture approved by this Court on February 18, 1966, defendants Aluminum Company of America and Cupples Products Corporation (hereinafter both referred to as "Alcoa") submit this third report. In this report Alcoa sets forth the steps taken in execution of the Plan of Divestiture since November 17, 1966, the date of its last report, and describes the terms and conditions of three offers received but not accepted since that date.

Alcoa also hereby respectfully petitions the Court under Paragraph 10 of the Plan of Divestiture to extend until July 1, 1966, its time to accomplish the divestiture required by Paragraph 2 of the Plan. The grounds for this petition, as more fully described below, are (a) that despite its diligent and intensive efforts to find a purchaser, as of February 1, 1967, Alcoa had not received any acceptable offer for the business and assets of Cupples; and (b) more time is required to continue certain negotiations now in progress, and if these pending negotiations fail, to continue its efforts to find a satisfactory purchaser for Cupples.

1. In the year ending February 1, 1967, Mr. Leon E. Hickman, Executive Vice President of Alcoa, negotiated with 141 parties for the purchase of Cupples. All of these negotiations included at a minimum an expression of interest by these parties and a request for Alcoa's brochure describing Cupples. A copy of this brochure is attached to this report as Exhibit A. In several cases, negotiations were quite extended. In every case in which the recipient of a brochure expressed any further interest in the company, an opportunity was offered to inspect the Cupples' properties. Although many of the prospects accepted the offer of inspection, apparently because of the

recent bleak earnings record of Cupples most went no further.

2. Thirty-three of the 141 parties with whom some negotiations were commenced have advised Mr. Hickman explicitly that they are no longer interested in purchasing Cupples. Some 55 of the others have evinced no interest in the past several months, and Alcoa has concluded that they have dropped consideration of this acquisition. As of February 1, 1967, however, 53 inquiries were still under discussion by telephone or letter, or were made so recently that further steps or negotiations are a possibility.

3. Thirty-three brokers, investment bankers, lawyers or accountants requested a copy of the brochure describing the property for sale, apparently for the purpose of acting as intermediaries between Alcoa and others who might be interested in acquiring Cupples.

4. During January, 1967, Alcoa advertised Cupples for sale in several publications of wide distribution. These publications and the dates on which this advertisement appeared were as follows:

American Metal Market (January 4, 9 and 16, 1967)

Wall Street Journal (January 4, 6 and 16, 1967)

Corona (California) Independent (January 4, 1967)

St. Louis Post Dispatch (January 3, 1967)

South Bend Tribune (January 3, 1967)

A copy of this advertisement, which was the same in all papers, is attached as Exhibit B.

5. Since November 17, 1966, the date of Alcoa's last report to the Court, three offers to purchase Cupples have been received and rejected as unsatisfactory. The identity of the offerors, and the terms and conditions of their re-

spective offers, in the order in which they were received are set forth below.

(a) On January 6, 1967, the Fifth Avenue Coach Lines, Inc. made an offer to purchase Cupples for $1,400,000 cash (with the right in its discretion to turn back to Alcoa for collection, within 120 days after closing, $1,000,000 of the approximate $7,000,000 outstanding accounts receivable) plus a 20-year non-interest bearing note of Fifth Avenue Coach Lines in the amount of $11,900,000 (or $10,900,000 if $1,000,000 of accounts receivable are turned back to Alcoa for collection). Fifth Avenue proposed to reduce this note each year by an amount equal to 25% of the net income earned by Cupples, with the balance to be paid at the end of the 20-year period. On January 16, 1967, this offer was rejected as unacceptable.

(b) On January 11, 1967, the Universal Marion Corporation made an offer to purchase Cupples on the following terms and conditions: Universal Marion to pay $1 for the net worth of the company (shown at $1,094,257 on the September 30, 1966 balance sheet) plus 5% 25-year subordinate debentures of Universal Marion in payment of the intracompany debt of $12,217,824 due to Alcoa. Universal Marion proposed that interest on these debentures would be waived for three years, and sinking fund requirements would be waived for five years; thereafter, a sinking fund of 4% of the initial debt would mature each year. Universal Marion further proposed that Alcoa guarantee the collectability of accounts receivable approximating $7,100,000 and the usability of inventory approximating $4,600,000; that it have a six-months option to purchase the Corona plant, with the right to pay for it in Universal Marion debentures at cost or market, whichever was lower; and that the balance of any unfunded pen-

sion liability be paid by Alcoa. On January 13, 1967, this offer was rejected as unacceptable.

(c) On January 13, 1967, Alfab, Inc., a Delaware corporation chartered for the express purpose of acquiring Cupples, made an offer of $15,500,000 for all of Cupples' stock, free and clear of any liabilities. Alfab proposed to pay as follows: $500,000 at closing (to be borrowed from a bank), plus unsecured notes to be paid off at the rate of $1,000,000 per year, plus interest, with the first payment to be due five years after closing. On January 26, 1967, this offer was rejected as unacceptable.

6. Negotiations for the sale of Cupples are presently pending with the following companies:

Jacobson Investment Company, Inc.
(In behalf of Messrs. Sidney Green and Dudley Himoff)

The Seagrave Corporation

National Gypsum Co.

American Cement Company

Certain-teed Products Corp.

In addition, in the past few weeks Messrs. Charles C. Moran and Roger E. Lord, Jr. have indicated further interest in negotiating for the purchase of Cupples. On the basis of its preliminary negotiations, Alcoa is hopeful of receiving firm offers from one or more of these parties within the next 90 days, especially if the apparent easing of the tight money market continues. However, if all of these negotiations fail, Alcoa will attempt to find a buyer for Cupples from among the approximately 50 parties who appear to have some possibility of interest in the matter.

7. Except while he was engaged on an almost daily basis from December 7, 1966 through January 12, 1967, in the controversy involving the curtain wall contract for the Port of New York Authority's World Trade Center Building, Mr. Leon E. Hickman has given the matter of finding a purchaser for Cupples virtually his full time since last August, when the Court rejected Alcoa's sale to Messrs. Moran and Lord on the terms then proposed. Messrs. Moran and Lord have also given this matter top priority in their work schedule. They have spent many hours in showing the properties and have accompanied Mr. Hickman on many of his negotiating trips. Mr. Frederick J. Close, Chairman of the Board of Alcoa, and Mr. John D. Harper, President of Alcoa, likewise have participated actively in Alcoa's efforts to find a purchaser. Other officers have also been called upon by Mr. Hickman for assistance as the occasion arose, and Mr. Hickman has discussed the matter of finding a purchaser for Cupples on many occasions with each of them.

8. As shown in this and the two previous reports filed by Alcoa pursuant to Paragraph 7 of the Plan of Divestiture, in the past year Alcoa has diligently sought to find a purchaser for Cupples. The 141 parties who wrote or telephoned for information as a result of the publicity concerning the divestiture requirement, whom officers of Alcoa were able to interest by personal solicitation, or who responded to Alcoa's newspaper advertising, are believed to exhaust the field of prospective purchasers. Other than the offer of Messrs. Moran and Lord which was before the Court last August, the only firm offers resulting from these inquiries have been the three described in paragraph 5 of this Report. Each of these recent offers was not only palpably unreasonable but also subject to a great degree to the same infirmities which impelled the Court to disapprove the earlier offer of Messrs. Moran and Lord.

9. Thus, Alcoa has been unable to accomplish divestiture within the time specified in Paragraph 2 of the Plan

of Divestiture. Accordingly, to enable it to pursue its pending negotiations and to continue its efforts to obtain a purchaser whose stake in Cupples will be sufficiently great to insure the continued operation of that company in the curtain wall field, Alcoa respectfully requests the Court for an Order:

1. Extending the period in Paragraph 2 of the Plan of Divestiture from February 1, 1967 to July 1, 1967; and

2. Requiring Alcoa to continue filing the reports provided for in Paragraph 7 of the Plan of Divestiture.

Respectfully submitted,

Dated: February 1, 1967

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APPENDIX D

No. 61 C 147 (2)

UNITED STATES OF AMERICA, *Plaintiff*,

v.

ALUMINUM COMPANY OF AMERICA and CUPPLES PRODUCTS CORPORATION, *Defendants*.

Government's Petition for Modification of Final Judgment

Pursuant to paragraph 7 of the Final Judgment entered in this cause on December 4, 1964, the United States of America petitions the Court for the following modification of that Judgment to become effective within ninety (90) days if Alcoa has not theretofore carried out the divestiture ordered by the Judgment and the Plan of Divestiture approved by the Court on February 18, 1966:

Strike paragraph 3 and substitute therefor:

3. (a) Within thirty (30) days after the effective date of this modification, Alcoa shall create a voting trust and transfer to it all shares of stock of Cupples.

(b) The trustees, who will be appointed by the Court at a compensation to be fixed by the Court and paid by Alcoa, shall elect a board of directors of Cupples, the majority of which shall be persons who hold no shares of stock of Alcoa.

(c) No person shall be eligible to serve as a trustee or member of the board of directors of Cupples who is an officer, director, or employee of a primary aluminum producer, or who controls, directly or indirectly, one-twentieth of one per cent or more of the stock of a primary aluminum producer or an affiliate or subsidiary thereof.

(d) Within six months fram the date of their appointment, the trustees shall sell all the stock of Cup-

ples held in trust by them or all of Cupples' assets to a purchaser who will undertake in good faith to continue the operation of Cupples as a going business and who is not objected to by plaintiff.

(e) As soon as the terms of sale have been agreed upon and at least thirty days before consummating the proposed sale, the trustees shall so advise the Court, with notice to plaintiff, identifying the purchaser and setting forth in appropriate detail the price, terms, and conditions of the proposed sale. At any time prior to consummation of the proposed sale, plaintiff may file with the Court and serve upon the trustees a statement of its objections to the proposed sale, and in such event the proposed sale shall not be consummated unless approved by the Court.

(f) In the event that sale of Cupples has not been accomplished in accordance with the provisions of paragraph (d) of this Order, within thirty days thereafter the trustees shall offer the assets of Cupples at a public sale to the purchaser who will undertake in good faith to continue the operation of Cupples as a going business, who is the highest bidder submitting a sealed bid, and who is not objected to by plaintiff. All bids shall be received and opened twenty (20) days after the offering. Ten (10) days after the opening the trustees shall advise the Court of the proposed sale, with notice to plaintiff, identifying the purchaser and setting forth in appropriate detail the price, terms, and conditions of the proposed sale. Thirty (30) days thereafter sale to such purchaser shall be consummated unless prior thereto plaintiff has filed with the Court and served upon the trustees a statement of its objections to the proposed sale, in which event the sale shall not be consummated unless approved by the Court.

(g) From the effective date of this modification until one year after the sale of Cupples has been approved by the Court, Alcoa shall not contract to supply any of

Cupples' aluminum requirements, unless no other supplier of aluminum is able or willing to supply those requirements at a price and upon terms and conditions as favorable as those which Alcoa offers, in which event Alcoa shall contract to supply such requirements of aluminum as Cupples may request, at such prices, terms, and conditions as are equally available to Cupples' competitors.

(h) If the purchaser of Cupples elects not to purchase the Corona assets referred to in paragraph 2(1) of the Final Judgment, or Cupples' assets at Dowagiac, Michigan, Alcoa shall sell those assets within niety (90) days after the sale of Cupples has been approved by the Court. As soon as the terms of sale have been agreed upon and at least thirty days before consummating the proposed sale, Alcoa shall so advise the Court, with notice to plaintiff, identifying the purchaser and setting forth in appropriate detail the price, terms, and conditions of the proposed sale. At any time prior to consummation of the proposed sale, plaintiff may file with the Court and serve upon Alcoa a statement of its objections to the proposed sale, and in such event the proposed sale shall not be consummated unless approved by the Court.

(i) All expenses incident to the accomplishment of the divestiture ordered herein shall be paid by Alcoa.

(j) Until five years after the agreement of sale of Cupples has been approved by the Court, Alcoa shall not engage, directly or indirectly, in the metal curtain wall business.

Respectfully submitted,

EDNA LINGREEN
Edna Lingreen
Attorney, Department of Justice

March 31, 1967

Memorandum in Support of Government's Petition for Modification of Final Judgment and in Opposition to Defendants' Request for Extension of Time.

Final Judgment entered in this cause on December 4, 1964 requires the Aluminum Company of America to divest itself of all of the stock and assets of Cupples Products Corporation, as well as of the assets located at Corona, California, which were operated by Cupples. Defendants' appeal to the Supreme Court with respect to divestiture of the Corona assets resulted in a stay of the Judgment. After the Supreme Court affirmed, a Plan of Divestiture was approved by this Court on February 18, 1966. Under that Plan Alcoa was required to accomplish divestiture in accordance with the Judgment by February 1, 1967. On May 23, 1966 Alcoa advised the Court that it had agreed to sell the Cupples assets to Charles C. Moran and Roger E. Lord, Jr., but that sale was disapproved on August 9, 1966. On February 1 defendants filed their third report, required under the Plan of Divestiture, and also petitioned for an extension of time until July 1, 1967 [1] within which to accomplish divestiture.

The Government is opposed to this request. While we acquiesced, in general, in the plan for divestiture which Alcoa submitted to the Court more than a year ago, events have demonstrated that that plan was inadequate to achieve divestiture. Accordingly, the Government now proposes modifications of the Judgment which it believes are appropriate to speed the accomplishment of effective divestiture.

The Government's Proposed Modifications

The Government proposes that, if Alcoa has not carried out the divestiture ordered by the Judgment and the Plan

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[1] Although defendants' request is for extension "until July 1, 1966," we assume this is a typographical error, in view of the fact that the request was made on February 1, 1967.

of Divestiture within an additional 90 days, the stock of Cupples shall be transferred to trustees independent of Alcoa. Under the Government's proposal, the trustees will elect a board of directors to operate Cupples pending divestiture and will be required to sell Cupples within six months of their appointment. Failing such sale, the proposed modification provides for public sale to the highest bidder submitting a sealed bid. Whether sale is accomplished by negotiation or by sealed bid, the Government would have the right to object to the sale, which would not be consummated unless approved by the Court.

The proposed modification of the Judgment also provides that Alcoa shall not contract to supply aluminum to Cupples unless Cupples cannot secure as favorable price and terms elsewhere. It enjoins Alcoa from engaging in the metal curtain wall business for a period of five years after the sale of Cupples. And if the purchaser of Cupples elects not to purchase the Corona and/or Dowagiac assets, those assets are required to be sold separately.

Need for Modification

Alcoa has represented that award of the contract to furnish the curtain wall for the World Trade Center will substantially enhance Cupples' saleability. Alcoa, however, has not yet complied with the divestiture which has been ordered. Should it fail to do so within the near future, we believe the case is made for a change in procedure in order to secure compliance with the Judgment and "restore Cupples to a position as an independent entity in the aluminum fabricating business."[2]

Such efforts as Alcoa has made in regard to divestiture may be summarized as follows: Until after the Supreme Court had affirmed the Final Judgment in this cause and the Plan of Divestiture had been approved by this Court,

[2] *United States* v. *Aluminum Company of America*, — F.Supp. — (E.D. Mo., January 13, 1967).

Alcoa declined to negotiate with interested persons for the stated reason that it was awaiting establishment of the "ground rules." Negotiations had begun meanwhile, however, with Messrs. Moran and Lord. From February 18, 1966, when the Plan of Divestiture was approved, until disapproval of the proposed sale on August 9, 1966, Alcoa turned away inquiries from others on the ground that it was negotiating with Moran and Lord.[3] Even after the disapproval, Alcoa moved at a leisurely pace. The brochure required by the Plan of Divestiture of February 18, 1966 was not made available until sometime in the fall. The notebooks of correspondence which Mr. Hickman has had with the 141 parties with whom Alcoa reports he negotiated[4] disclose that approximately half of these so-called negotiations were not initiated until January 1967, after Alcoa advertised Cupples for sale.

We have not seen documentation of all of the negotiations but some of what we have seen demonstrates that reluctant sellers find it difficult to make a sale. For example, in the document attached hereto as Appendix A, Mr. Hickman noted that a prospect was no longer interested in purchasing Cupples after talking with Messrs. Moran and Lord, who were reported to have been "entirely too pessimistic about the prospects of the company to justify further consideration." Such pessimism is hardly consistent with the recurring interest of Morgan and Lord to buy Cupples themselves,[5] but may have succeeded in discouraging others. Obviously anyone considering the purchase of Cupples would want to consult with Moran and Lord, the two individuals most thoroughly knowledgeable with respect to

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[3] Testimony of Leon Hickman, July 21, 1966, p. 77.

[4] Defendants' Third Report, February 1, 1967, p. 2.

[5] Defendants' Third Report, dated February 1, 1967, states, on p. 5, that "in the past few weeks Messrs. Charles C. Moran and Roger E. Lord, Jr. have indicated further interest in negotiating for the purchase of Cupples."

Cupples' business and prospects. In view of their admitted interest in acquiring Cupples themselves, they have a stake in discouraging others. Mr. Hickman recognized this when he added to his request to Mr. Moran that the Cupples property be shown in the best possible light the comment, "I realize that you face a conflict of interest in doing so . . . ."[6]

Alcoa has taken the position that the price at which Cupples will be sold is not negotiable. For example, on October 28, 1966, Mr. Hickman wrote to a potential purchaser, "I will not be in a position to lower our asking price . . . ."[7] Evidently Alcoa has decided on the price which it considers it should receive and refuses to lower it. As the letter notes, Alcoa is willing to negotiate on how much of Cupples' assets it will sell if a potential purchaser finds the price too high, but it will not negotiate the price.

There is nothing in the Final Judgment or the Plan of Divestiture approved by the Court, however, which can be interpreted as giving Alcoa the right to insist upon its asking price. In fact, the absence of such language evidences the Court's intention not to let any question concerning the reasonableness of the price stand in the way of divestiture. Alcoa submitted a proposed final judgment to the Court in October 1964 which contained a provision for divestiture "at a fair and reasonable price," but the Final Judgment does not include such language. Again, on December 28, 1965, when Alcoa submitted a plan of divestiture for the Court's approval, it proposed in paragraph 5 that divestiture be "at a reasonable price and upon reasonable terms," with "due regard" to such factors as the original price paid, expansion and improvements, Cupples' indebtedness to Alcoa, the current asset value, etc. On both occasions the Government opposed inclusion of the criterion of reason-

[6] Appendix B.

[7] Appendix C.

ableness of price. It urged that, inasmuch as Alcoa is under Court order to divest, it is entitled only to the best price it can get under all the circumstances and should not have the option to refuse an offer because it considers it too low. The Court struck Alcoa's proposed language. Paragraph 5 of the Plan of Divestiture which the Court approved reads in its entirety as follows:

> The divestiture required by this Plan shall be at a price and upon terms to be approved by the Court.

Despite this language and the circumstances of its adoption by the Court, Alcoa has taken the position with potential purchasers that it can set the price. Quite apart from the fact that Alcoa does not have the right to decide at what price it will sell, it may be that its price is too high. Mr. Hickman has called Cupples a "conundrum" and emphasized its poor earnings record. He has also noted that the industry has become highly concentrated, with two or three companies doing most of the business.[8] While he may consider this concentration desirable and points to Cupples as "the leader of its industry," it may be that a potential purchaser would have such reservations concerning Cupples' ability to continue in a leadership position in a concentrated industry without Alcoa as its parent as to make him reluctant to pay the price demanded by Alcoa.

To an inquiry from a person interested in acquiring the Corona property, Mr. Hickman responded on January 11, 1967 that Corona would not be available individually until sale of the other Cupples property had been approved by the Court. Then he added:

> Furthermore we have closed the Corona plant for lack of business and Cupples has moved the plant equipment back to St. Louis. Consequently Corona, if sold separately, will be disposed of as a piece of

[8] Appendix D.

industrial real estate. The anodizing facility is not there.[9]

This language appears to be inconsistent with the requirement of the Order entered by this Court on April 16, 1965 that the Corona plant be "maintained in good condition, capable of being reactivated promptly," and suggests either that defendants have acted in disregard of that Order or that Mr. Hickman has been highly inaccurate in negotiating with potential purchasers of Cupples.

The Government believes that the circumstances warrant such modification of the Judgment as will increase the incentive to comply with the Judgment promptly. For that reason the Government proposes that Alcoa be allowed a maximum of an additional 90 days to comply with the Plan of Divestiture. If it fails in that, control of Cupples should be taken from it and placed in trustees, who would have six months to sell the company by negotiation, after which it would be sold on sealed bid. Such provisions as these should serve as a spur to divestiture and therefore are appropriate in the circumstances.

The provision limiting Alcoa's right to contract to supply Cupples is also aimed at encouraging prompt divestiture, since this limitation would make retention of Cupples less profitable to Alcoa. Although Cupples apparently has not had a good earnings record during its ownership by Alcoa, there is no reason to believe that Alcoa has not found the relationship profitable, both in its aluminum sales to Cupples and in other ways. At the time of the acquisition Cupples had an earned surplus of $1.7 million (GX 5). Since then, even though Cupples was operating unprofitably, Cupples' directors continued to declare dividends, payable to Alcoa, until the surplus was exhausted. And, as is disclosed by Appendix F, Cupples' losses have meant tax savings for Alcoa. The unprofitability of Cupples,

[9] Appendix E.

therefore, can by no means be assumed to have been unfortunate for the parent. In fact, to the extent that the poor earnings record makes Cupples a less attractive purchase than a profitable company would be, Alcoa may, under an unmodified decree, consider its chances of ultimate retention of Cupples to be enhanced.

An injunction against Alcoa's competing with Cupples for a period of years would make Cupples a more attractive purchase than it would be if the purchaser were faced with the threat of Alcoa's competition. As is noted in Appendix G, when Messrs. Moran and Lord were negotiating for the purchase of Cupples they sought a commitment from Alcoa not to compete. But the agreement of sale which was submitted to the Court on May 23, 1966 contained no such provision. The Final Judgment which the Court entered on December 4, 1964, provided for divestiture within one year. It was therefore anticipated that the close association between Alcoa and Cupples which is inherent in common ownership would be severed promptly. It will, however, have continued for another two and a half years. Some reputation and knowledge in the curtain wall industry inevitably has accrued to Alcoa during the interval, enhancing the threat of its engaging in that business itself. If it did so it would be in competition with its severed subsidiary while trading on the reputation achieved by the combined operation during the years of existence of the illegal merger.

It would not be appropriate to leave the matter of Alcoa's possible competition to negotiation between Alcoa and the potential purchaser, lest Alcoa consider a commitment not to compete an asset for which it would expect to be paid. Rather it is the Government's view that a company making an illegal acquisition is entitled to no benefits or rewards from that acquisition. Alcoa is not entitled to profit from its acquisition of Cupples by going into the curtain wall business and therefore is not entitled to compensation for foregoing the right to engage in that business.

Conclusion

For the foregoing reasons, it is respectfully urged that the Judgment entered on December 4, 1964, be modified in accordance with the Government's proposals, and that defendants' petition for modification be denied.

Respectfully submitted,

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Dated: March 31, 1967